

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

**LOUIS HENDERSON, 438387,
Petitioner,**

V.

**RICK THALER, Director, Texas
Dept. Of Criminal Justice, Correctional
Institutions Division,**

No. 3:09-CV-741-G

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

This case has been referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The Findings, Conclusions and Recommendation of the Magistrate Judge are as follows:

I. Background

Petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 24, 1986, Petitioner was convicted of burglary of a building and was sentenced to twenty years imprisonment. *State of Texas v. Louis Henderson*, No. F86-87546-SI (Crim. Dist. Ct. No. 2, Dallas County, Tex., Nov. 24, 1986).

Petitioner does not challenge his conviction. Instead, he claims: (1) he is being improperly denied time credits while being held at a state intermediate sanction facility; (2) he has been improperly denied release to mandatory supervision; and (3) Respondent's failure to award him time credits and release him to mandatory supervision violates various Texas statutes.

Petitioner filed two state habeas petitions challenging his time credits. On July 7, 2000, Petitioner filed his first state habeas petition. *Ex parte Henderson*, No. 47,553-01. On

November 8, 2000, the Court of Criminal Appeals dismissed the application because Petitioner's direct appeal was still pending. On February 10, 2005, Petitioner filed his second state habeas petition challenging his time credits. *Ex parte Henderson*, No. 47,553-03. On October 11, 2006, the Court of Criminal Appeals denied the petition without written order.

II. Discussion

A. Statute of Limitations

The AEDPA establishes a one-year statute of limitations for federal habeas proceedings. *See* Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996). The one-year period is calculated from the latest of either: (A) the date on which the judgment of conviction became final; (B) the date on which an impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action; (C) the date on which the Supreme Court initially recognizes a new constitutional right and makes the right retroactively applicable to cases on collateral review; or (D) the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1)(A)-(D).

Petitioner has alleged no state-created impediment under subparagraph (B) that prevented him from filing his federal petition. Nor does he base his petition on any new constitutional right under subparagraph (C). With regard to subparagraph (A), the Court determines that it is inapplicable because it pertains to direct review of "the judgment," which is not at issue in this case. The Court will therefore calculate the one-year statute of limitations under subparagraph (D), from the date the facts supporting the claims raised in the instant petition became known or

could have become known through the exercise of due diligence.

In this case, Petitioner filed state habeas petitions challenging his time credits on July 7, 2000, and February 10, 2005. Therefore, the latest date he knew of these time credit claims was February 10, 2005. Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled during the pendency of state habeas proceedings. Petitioner's second habeas petition was pending until October 11, 2006. Petitioner then had one year, or until October 11, 2007, to file his federal petition. He did not file his federal petition until April 22, 2009. These claims are untimely.

B. Equitable Tolling

The one-year limitation period is subject to equitable tolling in "rare and exceptional cases." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir.1999) (asserting that courts must "examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling" (quoting *Davis*, 158 F.3d at 811)). The Fifth Circuit has held that " '[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.' " *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir.1996)). Petitioner bears the burden of proof to show he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

Petitioner has made no argument that he is entitled to equitable tolling. He has failed to show rare and exceptional circumstances justifying equitable tolling in this case.

C. Exhaustion

To the extent Petitioner raises time-credit claims and/or mandatory supervision claims


that were not included in his two state habeas petitions, he has failed to exhaust these claims. A petitioner must fully exhaust state remedies before seeking federal habeas relief. *See* 28 U.S.C. § 2254(b). This entails submitting the factual and legal basis of any claim to the highest available state court for review. *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982). A Texas prisoner must present his claim to the Texas Court of Criminal Appeals in a petition for discretionary review or an application for writ of habeas corpus. *See Bautista v. McCotter*, 793 F.2d 109, 110 (5th Cir. 1986); *Richardson v. Procnier*, 762 F.2d 429, 432 (5th Cir. 1985).

Although the terms of § 2254(b)(2) provide that an application for a writ of habeas corpus may be denied on the merits notwithstanding the applicant's failure to exhaust his state court remedies, complete exhaustion assists the federal courts in their review because federal claims that have been fully exhausted in state courts will necessarily be accompanied by a more complete factual record. *See Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

RECOMMENDATION:

The Court recommends that: (1) the claims Petitioner exhausted in his state habeas petitions be dismissed as time barred; and (2) Petitioner's remaining claims be dismissed without prejudice for failure to exhaust state remedies.

Signed this 21st day of September, 2011.



PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO OBJECT**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).